The method employed was not regarded by the men who founded our nation as a violation of any fundamental right, and its use in modern times, in view of the circumstances, does not seem so unreasonable as to be an abuse of legislative discretion. If fixing the interest at which money can be lent is a reasonable method of preventing usury, regulation of the prices at which commodities can be sold seems to be a reasonable method of preventing exorbitant profits. The court intimates that, had the statute been confined to necessities, it might have been constitutional. But usury statutes cover all loans, whatever the purpose for which the money is to be used. Laws against monopolies and combinations in restraint of trade do not exclude monopolies and combinations in businesses which the community could do without.[13] Certainly the Revolutionary price-fixing statutes made no distinction.[14] Nor is it at all evident that the creation of the Montana commission with the general power to act where it thought action advisable was not a far more effective and more just measure than would have been an arbitrary demarcation of the ground which the commission could cover. The more elastic method of a commission is clearly preferable to the Revolutionary device of setting out the prices in the act. While the power given the commission is great, the provision for court review of any price-fixing claimed to be unreasonable would operate to prevent its abuse.

If the economic pendulum is in reality swinging back, courts should hesitate to declare the Constitution an obstacle in its path. Here the situation involves not a deliberate change in the theory of government but only a state's effort to meet a temporary and difficult problem. That the effort involved a greater swerving from the doctrine of "The Wealth of Nations" than the last few generations have seen is enough to raise the question of constitutionality, but it should not be enough to answer it. As Mr. Justice Holmes has said,[15] "due process" is not synonymous with "laissez-faire"; it is more important that a state be allowed to meet its problems in its own way than it is to keep inviolate any theory of economic expediency.

EXTRATERRITORIAL ENFORCEMENT OF INHERITANCE TAX BY SUIT AGAINST BENEFICIARIES. — There are some limits to a sovereign's power to tax.[1] In our political system the power of each sovereign

South Dakota, 226 U. S. 157 (1912), where a statute making it criminal for any one engaged in the production, manufacture, or distribution of any commodity in general use to discriminate in price between different sections was held constitutional.

[13] Central Lumber Co. *v.* State of South Dakota, *supra*.

[14] See note 5, *supra*, and the comprehensive nature of the acts there cited. The Rhode Island Act of 1776, for instance, fixed the price of wheat, rye, corn, wool, pork, swine, beef, hides, salt, rum, sugar, molasses, cheese, butter, peas, beans, potatoes, stockings, shoes, cotton, oats, flax, coffee, tallow, turkeys, geese, charcoal, hard soap, English hay, teaming work, staves, tobacco, breeches, cocoa, beaver hats, lime, milk, and shaves.

[15] "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner *v.* New York, 198 U. S. 45, 75 (1905).

[1] "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State." Field, J., in State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 300, 319 (1872).

extends only to his territorial boundaries.[2] His jurisdiction to tax may equal his power, but can never exceed it.[3] So it has long been thought that a state cannot tax interests in foreign realty [4] or personalty having a *situs* without its borders [5] or a person not domiciled therein.[6] Likewise a privilege is taxable only by the sovereign which affords the privilege.[7]

The Appellate Division of the Supreme Court of New York has lately ridden rough-shod over these doctrines of territorial limitations upon power. A resident of Colorado died in New York leaving no property of any sort in Colorado, but a great deal of personalty in New York. His will was admitted to original probate in New York as the will of a non-resident; New York transfer taxes were assessed and collected. Two years later Colorado served the New York beneficiaries by publication with notice of assessment proceedings in a county court of Colorado which by statute had jurisdiction to proceed as in an action *in rem*.[8] No one appeared, but the court issued its order that the tax had been assessed. The state of Colorado then brought an action [9] in New York against the beneficiaries.[10] The Supreme Court dismissed the complaint,[11] but its judgment was unanimously reversed by the Appellate Division.[12] It is believed that the latter decision is unsupportable.[13]

There was no judgment on which Colorado could sue in New York. A tax assessment order is not a judgment.[14] It can create no lien upon

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[2] Erie Railroad *v.* Pennsylvania, 153 U. S. 628 (1894). See BEALE, CONFLICT OF LAWS, § 104; GRAY, LIMITATIONS ON TAXING POWER, § 69.

[3] "The power to tax involves the power to destroy." Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 431 (1819). See Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587.

[4] Louisville, etc. Ferry Co. *v.* Kentucky, 188 U. S. 385 (1903). See Winnipiseogee, etc. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849 (1887).

[5] Hays *v.* Pacific Mail S. S. Co., 17 How. (U. S.) 596 (1854).

[6] Dewey *v.* Des Moines, 173 U. S. 193 (1899); On Yuen Hai Co. *v.* Ross, 8 Sawy. (U. S.) 384, 14 Fed. 338 (1882); City of New York *v.* McLean, 170 N. Y. 374, 63 N. E. 380 (1902); State *v.* Ross, 23 N. J. L. 517 (1852).

[7] *In re* Swift, 137 N. Y. 77, 32 N. E. 1096 (1893). Inheritance taxes, being privilege taxes, may be imposed upon a single succession by two states, — the state of domicile of the deceased and the state of *situs* of the property. Kochersperger *v.* Drake, 167 Ill. 122, 47 N. E. 321 (1897); Matter of Romaine, 127 N. Y. 80, 27 N. E. 759 (1891). No other sovereign can levy such a death duty. City of New York *v.* McLean, *supra*. See Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 624 ff.

[8] See COLO. SESS. LAWS 1913, chap. 136, § 18, p. 553.

[9] "Nothing contained in this provision [authorizing, on application of the Attorney General, issue of administration with will annexed] shall be construed to prevent the enforcement of the collection of any tax provided for herein in any other manner as may be provided in this act or by law." COLO. SESS. LAWS 1913, chap. 136, § 13, p. 551. See also *Ibid.*, § 19, p. 553, and § 26, pp. 555, 556.

[10] The Colorado statute makes "all legatees . . . liable for . . . such taxes" from the decedent's death, and provides that "the tax prescribed by this act . . . shall be and remain a lien" on the property until paid. COLO. SESS. LAWS 1909, §§ 1, 2, pp. 460 ff. See Palmer's Estate, 25 Colo. App. 450, 139 Pac. 554 (1914).

[11] Colorado *v.* Harbeck, 175 N. Y. Supp. 685 (1919).

[12] *Ibid.*, 179 N. Y. Supp. 510 (1919). See RECENT CASES, p. 870, *infra*.

[13] No attempt will be made to consider all the reasoning of the court, such as its reversion to the antiquated notion that "the legal *situs* of his personal property followed the domicile, although such property was physically within this state," p. 514. See Union Transit Co. *v.* Kentucky, 199 U. S. 194, 206 ff. (1905); Hoyt *v.* Comm'rs of Taxes, 23 N. Y. 224, 227 ff. (1861).

[14] Peirce *v.* Boston, 3 Met. (Mass.) 520 (1842).

property outside the borders of the taxing power.[15] There was no *res* in Colorado to support a judgment *in rem*.[16] Over the non-resident beneficiaries who never appeared in Colorado, there was no jurisdiction to support a judgment *in personam*.[17] If the Colorado assessment order be regarded as a judgment, still the New York courts should not give it faith and credit since it was rendered without jurisdiction.[18] Moreover, even if personal jurisdiction had been obtained in Colorado over these defendants prior to such a judgment for taxes, the judgment would be unenforceable in New York under the well-known doctrine that penal,[19] which includes revenue,[20] laws will not be enforced abroad even under the due faith and credit clause of the Constitution.

But the New York court says that by their conduct the defendants assumed the Colorado statutory obligation to pay a tax, "and thereby made it their contractual obligation." [21] The imposition of such an *assumpsit* is ingenious,[22] and, if sustained by the Court of Appeals, will gladden the hearts of tax collectors. But the idea is fundamentally unsound. The court, being unable to cite authorities,[23] rests upon an analogy to actions against shareholders in foreign corporations for taxes imposed by the state of corporate charter.[24] Personal liability, however, cannot be rested upon the non-resident shareholder, for want of jurisdiction or power over him.[25] So in the case before the court it is because the defendants were not residents of Colorado that no personal liability could be imposed by Colorado upon them. And the property involved was never in Colorado, from which it follows that, unlike shares in a

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[15] Wabash R. *v.* People, 138 Ill. 316, 27 N. E. 456 (1891). *Cf.* Schwinger *v.* Hickok, 53 N. Y. 280 (1873).

[16] And even if there were a judgment *in rem* in Colorado, it could not be enforced in New York. Maltbie *v.* Lobsitz Mills Co., 223 N. Y. 227, 119 N. E. 389 (1918).

[17] Pennoyer *v.* Neff, 95 U. S. 714 (1878); Dewey *v.* Des Moines, *supra.*

[18] Baker *v.* Baker, Eccles. & Co., 242 U. S. 394 (1917); Thompson *v.* Whitman, 18 Wall. (U. S.) 457 (1873); D'Arcy *v.* Ketchum, 11 How. (U. S.) 165 (1850).

[19] Huntington *v.* Attrill, 146 U. S. 657 (1892); Pickering *v.* Fish, 6 Vt. 102 (1834). See Matter of Antelope, 10 Wheat. (U. S.) 66, 123 (1825). See also STORY, CONFLICT OF LAWS, § 625 A.

[20] Maryland *v.* Turner, 75 N. Y. Misc. 9, 132 N. Y. Supp. 173 (1911). See Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 290, 291 (1888); Henry *v.* Sargeant, 13 N. H. 321, 332 (1843).

[21] 179 N. Y. Supp. 510, 517.

[22] Contrast, "Taxes do not rest upon contract express or implied." Chase, J., in Rochester *v.* Bloss, 185 N. Y. 42, 47, 77 N. E. 794, 795 (1906). "Taxes are not debts. . . . Debts are obligations for the payment of money founded upon contract, express or implied." Field, J., in Meriwether *v.* Garrett, 102 U. S. 472, 513 (1880). To the same effect, Bradford *v.* Story, 189 Mass. 104, 75 N. E. 256 (1905); Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634 (1909).

[23] *Dicta* which tend to support an ill-defined contractual or *quasi* contractual obligation in somewhat similar situations are found in Succession of Pargoud, 13 La. Ann. 367 (1858); Montague *v.* State, 54 Md. 481, 487 (1880). *Cf.* Goodrich *v.* Rochester Trust Co., 173 App. Div. 577, 160 N. Y. Supp. 464 (1916).

[24] Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489 (1900); Shipman *v.* Treadwell, 200 N. Y. 472, 93 N. E. 1104 (1911). The language used here and elsewhere by other judges has led some to believe that the courts thought a personal liability based upon an undertaking assumed by the acquisition of shares in foreign corporations could exist. See Corry *v.* Baltimore, 196 U. S. 466 (1905).

[25] Maltbie *v.* Lobsitz Mills Co., *supra;* City of New York *v.* McLean, *supra. Cf.* Bristol *v.* Washington County, 177 U. S. 133 (1900); Dewey *v.* Des Moines, *supra.*

Colorado corporation, there is no *res* on which a Colorado statute could have imposed a lien.

The court reasons further: "The defendants having invoked the aid of the state of Colorado and taken decedent's property through the operation of its laws, must comply with any conditions that state may impose in granting the benefits." [26] It is a well-established rule of the common law that the laws of succession of the deceased's domicile govern the distribution of the movable estate wherever found.[27] In accordance with this doctrine, reaffirmed by New York statute,[28] the Surrogate used Colorado rules in his selection of the beneficiaries. But as a matter of terminology it should be carefully noted that New York did not thereby administer Colorado law.[29] A New York court can administer nothing but New York law.[30] Yet as Colorado did furnish an ingredient to the defendants' succession, Colorado might impose a tax on the privilege of succession.[31] But New York has no statute providing that New York shall collect taxes for other states. And Colorado never had any jurisdiction or power over any person or thing from whom or from which it could collect the tax here sought. The result of this unique decision is that a court without statutory authority to do so may enforce a foreign tax imposed by a state without jurisdiction or power itself to collect the tax.

IS HOMICIDE COMMITTED WHERE THE BLOW IS STRUCK OR WHERE THE DEATH OCCURS? — In *State* v. *Criqui*,[1] recently decided, we have the recurrence of a question which has been the subject of controversy from early times. A blow was struck in county A, from the effects of which the victim died in county B. The defendant was tried and convicted in the latter county under a statute which provided that in such a situation either county might entertain jurisdiction to punish the homicide. The state constitution, however, assured the accused of an impartial trial in the county where the offense was alleged to have been com-

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[26] 179 N. Y. Supp. 510, 515.

[27] Harvey *v.* Richards, 1 Mason (C. C. U. S.) 381 (1818); Lawrence *v.* Kitteridge, 21 Conn. 576 (1852). See Wilkins *v.* Ellett, 9 Wall. (U. S.) 740 (1869).

[28] "Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other [than real] property situated within the state, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident at the time of his death." N. Y. Decedent Estate Law, § 47.

[29] See Lawrence *v.* Kitteridge, *supra;* Estate of Apple, 66 Cal. 432, 6 Pac. 7 (1885). *Cf.* Howarth *v.* Angle, 162 N. Y. 179, 187, 56 N. E. 489, 492 (1900).

Illinois by statute provided that Illinois statute laws should govern the descent and distribution of "estates, both real and personal, of residents and nonresident proprietors in this state dying intestate." REV. STAT. ILL., chap. 39, § 1. Yet the Illinois court still continued to look to the domicile of the deceased for rules of distribution of choses in action belonging to a non-resident. Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61 (1892).

[30] See BEALE, CONFLICT OF LAWS, § 112.

[31] See Magoun *v.* Illinois Bk., 170 U. S. 283, 288 (1898); United States *v.* Perkins, 163 U. S. 625, 628 (1896); *In re* Macky's Estate, 46 Colo. 79, 102 Pac. 1074 (1909); *In re* Swift, *supra.*

[1] 185 Pac. 1063 (Kan. 1919). See RECENT CASES, p. 863, *infra.*